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THEORIES OF LOSS OF CITIZENSHIP

*T. Alexander Aleinikoff**

On October 2, 1985, the United States Department of State stripped Rabbi Meir Kahane of his American citizenship. The State Department based its action on section 349(a)(4)(A) of the Immigration and Nationality Act (INA),¹ which provides for loss of American nationality for any U.S. citizen "accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state . . . if he has or acquires the nationality of such foreign state." Kahane came within this provision, the Department asserted, when he assumed a seat in the Israeli Parliament (the Knesset) in August 1984.² Rabbi Kahane appealed to the State Department's Board of Appellate Review. On May 1, 1986, the Board in *In re Kahane* affirmed the administrative determination of loss of citizenship.³

The Supreme Court has all but eliminated the power of Congress to terminate U.S. citizenship without the consent of the citizen. "In the last analysis," the Court wrote in *Vance v. Terrazas*, "expatriation depends upon the will of the citizen rather than on the will of Congress and its assessment of his conduct."⁴ Under this standard, it is difficult to understand the State Department's action against Kahane. Both before and after assuming his Knesset seat, Kahane informed the State Department that he had no intention of relinquishing U.S. citizenship. And the State Department has acknowledged that Kahane "has a strong and admitted motive"⁵ for retaining U.S. citizenship: as a citizen, Kahane may enter and leave this country virtually as a matter of will — a right that would be lost if citizenship were terminated.⁶

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1. 8 U.S.C. § 1481(a)(4)(A) (1982).

2. Kahane became a citizen of Israel under the Israeli Law of Return, which authorizes the granting of citizenship to any Jew who settles in Israel.

3. *In re Kahane* (Dept. of State, Board of Appellate Review, May 1, 1986) (unpublished, on file at Michigan Law Review).

4. 444 U.S. 252, 260 (1980).

5. Brief of Appellee, Department of State, at 37, *Kahane* [hereinafter cited as State Department Brief].

6. If the State Department's action is sustained in the courts, Kahane will have to apply for admission to the United States as an alien. As such, he would be subject to the various grounds

But in its brief to the Board of Appellate Review, the State Department argued that Kahane's "actions speak louder than [his] words" in determining his true intent. Characterizing Kahane's statements as "self-serving," the Department argued that Kahane's writings and speeches demonstrated that he had "completely transferred allegiance to [Israel], thereby abandoning United States citizenship."⁷

The Board of Appellate Review accepted the Department's reasoning. Referring to Kahane's "purposeful involvement over an extended period of time in the political life of [Israel]" and his admission that "his primary loyalty is to Israel," the Board concluded:

Rabbi Kahane's voluntary acceptance of an important political post in the government of Israel is persuasive evidence of an intent to relinquish United States citizenship. . . . The declaration of allegiance he made to Israel also "provides substantial evidence" of an intent to abandon citizenship. *King v. Rogers*, 463 F.2d at 1189. Other words and actions, which demonstrate unambiguously that he transferred his allegiance from the United States to Israel, supply overwhelming evidence of his "voluntary relinquishment" of United States citizenship. Measured against the foregoing evidence, Rabbi Kahane's disavowals in 1984 of an intent to relinquish citizenship and the fact that he has certain ties to and interests in the United States simply cannot be considered, as his counsel maintains, "strongly probative" of a lack of intent to abandon citizenship.⁸

One can readily agree with the Board that Kahane's statements cannot be conclusive on the issue of intent. (Imagine, for example, a gunman telling a victim, "Now, remember, I never intended to shoot you.") But the Board's decision cites no evidence that Kahane intended to relinquish citizenship. That is hardly surprising. What reason would Kahane have for voluntarily giving up U.S. citizenship? Kahane has not sought to avoid the military draft or American taxes.⁹ Nor does Israeli law presently require candidates for political office to renounce citizenship of foreign states. Indeed, the Board's decision quotes Kahane's statement that he "would have long since given . . . up [U.S. citizenship] if I did not fear — and with justification — that if I gave it up, the American Government would place great obstacles

of exclusion of the immigration laws. See INA § 212(a), 8 U.S.C. § 1182(a) (1982). The laws endow the executive branch with ample authority to keep out aliens whose entry it believes would be "prejudicial to the public interest." INA § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1982). Given Kahane's links to violent Jewish groups in the United States, he would stand a real risk of being denied entry. Furthermore, as the State Department pointed out in its brief, Kahane may be excludable on criminal grounds, based on his federal firearms conviction in 1971. State Department Brief, *supra* note 5, at 38 n.1b. See INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1982).

7. State Department Brief, *supra* note 5, at 2, 19.

8. *Kahane* at 13, 14.

9. Cf. *Terrazas v. Vance*, 577 F.2d 7 (7th Cir. 1978), *revd.*, 444 U.S. 252 (1980) (plaintiff renounced American citizenship apparently in order to avoid the draft).

... to enter America for lecture tours.”¹⁰ Perhaps the Board is correct that Kahane has *transferred allegiance* to Israel, but clearly such a transfer can occur with no accompanying intent to relinquish the benefits of U.S. citizenship.

It appears that the State Department’s action and the Board’s decision are about something other than intent to relinquish U.S. citizenship. But this shift to a focus on allegiance is not currently countenanced by the case law. Thus, the Kahane case may produce a reconsideration of the constitutional doctrine regarding loss of nationality. The underlying issue that I address in this essay is whether the Constitution ought to be read to prohibit denationalization of U.S. citizens. (I will use the term “denationalization” to refer to the government’s act of terminating citizenship. “Expatriation” will be used to refer to an individual’s voluntary relinquishment of citizenship.) In examining this question, I will explore citizenship from four different perspectives — rights, consent, contract, and community — in search of a theoretical framework for the Supreme Court’s doctrine in the denationalization cases.

I. REASONS FOR DENATIONALIZATION

One can imagine a number of reasons why a nation might want to terminate citizenship of individuals and groups. I will put denationalization grounds into three categories: allegiance, punishment, and public order.

Citizenship is often thought of in terms of allegiance. From the earliest American naturalization laws, aliens seeking to become U.S. citizens have been required to “renounce and abjure absolutely and entirely all allegiance” to any foreign sovereign and “to bear true faith and allegiance” to “the Constitution and the laws of the United States.”¹¹ A person’s breach or denial of allegiance may be viewed by some as severing the link between citizen and nation, thereby entitling the state to denationalize.

Allegiance may be deemed to lapse in several situations. The most obvious is a *transfer of allegiance*. Such transfers are often explicit: a person will renounce citizenship of one nation and be naturalized in another. But there is no reason why transfer of allegiance may not occur without express renunciation. One may want to maintain the benefits of citizenship in one nation even if one’s true allegiance is to

10. *Kahane* at 14.

11. INA § 337, 8 U.S.C. § 1448 (1982). The requirement of this oath traces to an early nationality act. Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (1798).

another. In such a situation, a country may seek to acknowledge the choice that the citizen has made — whether or not the citizen admits the transfer of allegiance. This, of course, is the State Department's position in the *Kahane* case.

Allegiance is not necessarily indivisible. Just as people may feel loyalty to different family members, different groups, or different institutions of higher learning, so might a person have allegiance to more than one nation. Here the problem for the state is not a transfer of allegiance, but *divided allegiance*. Some may believe that a state may insist on undivided loyalty (as the United States does in its naturalization oath); it may, like the two-timed lover, force the citizen to choose.

A citizen may also demonstrate a *lack of allegiance* without having allegiance elsewhere. This is the situation of either active disloyalty (for example, treason¹²) or simply no loyalty at all (apathy or unconcern about the fate of the nation). To the extent a nation seeks a citizenry dedicated to the support and defense of the country, it may want to rid itself of enemies¹³ or deadbeats.

While we normally think of citizenship in allegiance terms, there is no *a priori* reason why denationalization must be linked to a lapse in one's allegiance. If citizenship is seen as granting benefits, a state may seek to deny such benefits to people it believes are unworthy of enjoying them. Denationalization, on this account, may be justified as *punishment*. Congress has enacted several denationalization grounds that fall within this category, such as violation of laws against subversion, draft evasion, and desertion from the armed forces in time of war.¹⁴ Interestingly, these grounds have an "allegiance" ring to them. But nothing under the punishment theory would prevent denationalization for any anti-social conduct — for example, murder, child abuse, or failure to pay taxes.

A final set of denationalization grounds would include loss of citizenship for individuals or groups that the state deems threats to *public order*. Such citizens may view themselves as loyal to the state, and they may not have violated any criminal laws; nonetheless the state may conclude that their membership in the nation poses a substantial problem for the maintenance of the status quo or the pursuit of other

12. See INA § 349(a)(7), 8 U.S.C. § 1481(a)(7) (1982).

13. In 1931, the Soviet Union imposed denationalization upon persons convicted of being "enemies of the toiling masses." McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900, 942 (1974).

14. INA § 349(a)(7), 8 U.S.C. § 1481(a)(7) (1982) (subversion); Immigration and Nationality Act of 1952, § 349(a)(8), 66 Stat. 267 (1952) (desertion), *repealed by* Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978); Immigration and Nationality Act of 1952, § 349(a)(10) (1952) (draft evasion), *repealed by* Pub. L. No. 94-412, § 501(a)(2), 90 Stat. 1258 (1976).

national objectives. Hannah Arendt has written powerfully of the mass denationalizations following World War I.¹⁵ The most horrific recent example is the "homelands" policy of South Africa: blacks living in South Africa were stripped of South African citizenship and given citizenship in "independent" homelands based on tribal background.¹⁶ One can also imagine a state seeking to denationalize citizens who are deemed dangerous to national security or who embroil the state in foreign controversies.¹⁷

II. DENATIONALIZATION AMERICAN STYLE

Given this rather large number of situations in which denationalization may be a rational state response to the conduct of its citizens, it is interesting that Congress has enacted denationalization legislation only sparingly. Indeed, for the first hundred years of this nation's history, the central loss-of-citizenship question was expatriation, not denationalization.¹⁸ Congress entered the field by enacting the Expatriation Act of 1868,¹⁹ which sought to protect naturalized U.S. citizens who returned to their countries of origin.²⁰ The Act declared:

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore, . . . any

15. H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 267-302 (2d ed. 1960).

16. See generally Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DEN. J. INTL. L. & POLY. 11 (1980). Other examples include denationalization of some two million Russians outside the Soviet Union in 1921, the 1941 Nazi denationalization of Jews abroad (including Jews transported out of Germany to concentration camps), and the postwar denationalization of more than half a million Koreans who were living in Japan.

17. For an example of the latter ground, see Nationality Act of 1940, § 401(e), 54 Stat. 1137 (1941) (voting in a foreign election), *repealed by* Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978). After World War II, several East European countries passed statutes authorizing denationalization of citizens living abroad who undertook actions "prejudicial to the national and state interests." McDougal, Lasswell & Chen, *supra* note 13, at 945.

18. Expatriation raised two kinds of questions. First, was a U.S. citizen's right to expatriate himself absolute, or could it be regulated by Congress (or the states)? This issue arose in several cases involving U.S. citizens who purported to expatriate themselves in order to join in a conflict between two foreign nations without violating U.S. law requiring citizens to remain neutral. See, e.g., *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795). Second, what was the status of a naturalized U.S. citizen who returned to his country of origin? The position of the United States was that such a person had fully expatriated himself and owed no obligation to his country of origin.

19. Ch. 249, 15 Stat. 223 (1868).

20. The immediate stimulus for the statute was British treatment of naturalized U.S. citizens in Ireland who participated in anti-British activities.

declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of this government.²¹

Nothing on the face of the statute restricted its application to naturalized U.S. citizens, and executive branch interpretations quickly made clear that it could be invoked by U.S. citizens who sought to relinquish American citizenship.²² But recognition of a right of expatriation proved to be a double-edged sword for U.S. citizens. Once it was firmly established that Americans could cast off their allegiance, it left room for the government to argue that certain objective conduct evidenced expatriation — such as naturalization elsewhere or residence of a naturalized citizen in his or her country of origin. The expatriation statute of 1868 did not speak to this issue; it simply announced a right. When, forty years later, Congress next addressed loss of citizenship, it adopted the view that objective circumstances could establish expatriation. In so doing, it provided for the first time for denationalization of U.S. citizens.²³

The 1907 Expatriation Act was primarily aimed at problems occasioned by dual nationality. It provided that a U.S. citizen “shall be deemed to have expatriated himself” when he has been naturalized in, or taken an oath of allegiance to, a foreign state. The Act also created a rebuttable presumption that a naturalized alien who resided for two years in his native country “has ceased to be an American citizen.” Finally, it provided that any American woman who married a foreigner “shall take the nationality of her husband” (for so long as the marriage lasted).²⁴

The Act’s focus on dual nationality seems to place the statute in the transfer-of-allegiance and divided-allegiance categories. But it also had significant “public order” undertones. The stripping of nationality was not simply the cutting of ties to a disaffected citizen; it was also

21. Ch. 249, 15 Stat. 223 (1868).

22. 14 Op. Atty. Gen. 295 (1873).

23. Arguably, section 21 of the Enrollment Act of 1865 was the first denationalization statute. It provided that deserters from military service “shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship.” Ch. 79, § 21, 13 Stat. 487, 490 (1865). However, historian John Roche concludes that the phrase “rights of citizenship” was probably intended to refer to the attributes of citizenship (such as the franchise), rather than nationality. Roche, *The Expatriation Cases: “Breathes There the Man, with Soul so Dead . . . ?,”* 1963 SUP. CT. REV. 325, 335-36.

24. Ch. 2534, § 3, 34 Stat. 1288 (1907). This provision was repealed fifteen years later. Act of Sept. 22, 1922, Ch. 411, § 7, 42 Stat. 1021, 1022. In 1934, Congress amended the 1907 Act to permit any U.S. citizen who married a foreigner to make a formal renunciation of U.S. citizenship. Act of May 24, 1934, ch. 344, § 3, 8 Stat. 797.

The 1907 Act affirmed that there were still limits on the right of expatriation: it prohibited an American from expatriating himself during wartime. Ch. 2534, § 2, 34 Stat. 1228 (1907).

an attempt to avoid the problems of protection that dual nationals caused the United States abroad — problems that threatened to involve the government in foreign controversies. Importantly, the statute clearly authorized the denationalization of U.S. citizens who had no desire to lose American nationality.

In 1940, Congress added several new grounds for loss of nationality.²⁵ Most followed the theory of the earlier statute that certain acts could reasonably be understood as indicating a transfer of (or, at least, divided) allegiance and that the government had the power to avoid such situations. Thus, citizenship was lost by formally renouncing it overseas, serving in the armed forces of a foreign state if the person also had acquired the nationality of such state, voting in a political election of a foreign state, or accepting the duties of an office or employment under the government of a foreign state for which only nationals of that state were eligible. But the statute also included two grounds that appeared to be concerned about something other than transferred or divided allegiance: conviction of desertion in time of war²⁶ and conviction of treason or attempting to overthrow the U.S. government by force. These provisions appear penal in nature, since they apply after conviction of a criminal offense. Furthermore, because they were excepted from the general rule that denationalization took effect only after the citizen had taken up residence abroad, they permitted the denationalization of citizens who may not have acquired citizenship elsewhere.

Congress subsequently added other penalty-based denationalization grounds. A 1944 statute provided for loss of citizenship for persons who departed the United States in time of war to avoid military service.²⁷ The Expatriation Act of 1954 authorized denationalization for certain convictions under the Smith Act.²⁸

25. Ch. 876, 54 Stat. 1137 (1940).

26. The desertion provision had its roots in the 1865 statute that stripped deserters of "the rights of citizenship." See note 23 *supra*. During consideration of the 1940 legislation, the State Department stated that it interpreted the 1865 statute to impose loss of citizenship, not merely "the rights" that accompany citizenship. Thus, it viewed the provision in the nationality bill as essentially restating existing law. *To Revise and Codify the Nationality Law of the United States into a Comprehensive Nationality Code: Hearing on H.R. 6127 superseded by H.R. 9980 before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 132-33 (1940)* (statement of Richard W. Flournoy, Assistant Legal Advisor, Department of State).

27. Act of Sept. 27, 1944, ch. 418, 58 Stat. 746.

28. Ch. 1256, § 2, 68 Stat. 1146 (1954). Minor changes were also made by the massive Immigration Act of 1952, including amending the provision relating to employment in a foreign government so that it reads as it does today.

Other denationalization proposals were not enacted. See, e.g., *Expatriation of Certain Nationals of the United States: Hearings before the House Committee on Immigration and Naturalization, 78th Cong., 2d Sess. (1944)* (concerning bills aimed at denationalizing U.S. citizens of Japanese ancestry indicating loyalty to the Emperor of Japan).

It is possible to see all of the statutory grounds for loss of citizenship as falling within the allegiance category.²⁹ Even so, the most recent statutes evidence greater concern with lack of allegiance than with transfer of, or divided, allegiance. But perhaps more accurately, the later-added grounds ought to be seen in punishment³⁰ or public order terms. Moving away from transferred or divided allegiance grounds for denationalization is doubly significant: it means that citizenship may be terminated against the will of the citizen, and it raises the possibility of statelessness.

III. THE JUDICIAL RESPONSE

The Supreme Court had little difficulty sustaining the early denationalization statutes. In *Mackenzie v. Hare*,³¹ it upheld the provision of the 1907 statute that denationalized an American woman (a lifelong resident of California) who had married a British citizen. Four decades later, in *Perez v. Brownell*,³² the Court rejected a constitutional challenge to the section of the 1940 Act that denationalized a U.S. citizen for voting in a foreign election.

Both cases may be read as recognizing power in the government to sort out divided allegiances. Mrs. Mackenzie's marriage was assumed to give rise to conflicting loyalties because of the "ancient principle" of the "identity of husband and wife."³³ And Justice Frankfurter, writing for the Court in *Perez*, stated: "Congress has interpreted [voting in a foreign election], not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."³⁴

But more important in each case was the public order justification

29. For example, the Senate Report on the 1954 legislation stated that "the advocating of the overthrow, or the joining in a conspiracy to overthrow, the Government of the United States through the activities of the Communist Party and its membership is tantamount to the transfer of allegiance to the foreign power which directs such activities of the Communist Party." S. Rep. No. 2198, 83d Cong., 2d Sess. 4 (1954).

30. See Roche, *supra* note 23, at 333-37; Note, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1178-83 (1955); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 163-86 (1963).

31. 239 U.S. 299 (1915).

32. 356 U.S. 44 (1958).

33. *Mackenzie*, 239 U.S. at 311.

34. 356 U.S. at 60-61. It is significant that both cases permitted the government to determine when conflicts of allegiance exist. That the citizens neither felt a conflict nor desired to relinquish U.S. citizenship was immaterial. In *Mackenzie*, the Court avoided the plaintiff's objection to involuntary denationalization by finding that she had entered into the marriage voluntarily "with notice of the consequences." 239 U.S. at 312. Justice Frankfurter, in *Perez*, was more straightforward. He properly read *Mackenzie* as "reject[ing] . . . the notion that the power of Congress to terminate citizenship depends upon the citizen's assent." 356 U.S. at 61.

offered by the government. In *Mackenzie*, the Court found that the "marriage of an American woman with a foreigner" may "bring the Government into embarrassments and, it may be, into controversies."³⁵ Similarly, the crucial portions of Justice Frankfurter's opinion in *Perez* are devoted to explaining how "the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country."³⁶ Recognizing these public order concerns as legitimate suggests a denationalization power far broader than one limited to allegiance grounds. Foreign "embarrassments" and "controversies" are not simply the product of dual allegiances. Domestic opponents of American foreign policy or Americans traveling overseas might equally embroil the United States in international disputes. Could Congress denationalize anyone who interfered with the pursuit of American foreign policy?³⁷ The standard adopted by Justice Frankfurter in *Perez* left room for a broad power indeed: "the means . . . withdrawal of citizenship — must be reasonably related to the end — here, regulation of foreign affairs."³⁸ Applying this test, Frankfurter held that Congress could reasonably believe that the problems occasioned by citizens voting in foreign elections "might well become acute, to the point of jeopardizing the successful conduct of international relations."³⁹ Denationalization was an appropriate remedy because "[t]he termination of citizenship terminates the problem."⁴⁰ There is nothing in this analysis that turns on the allegiance of the overseas voter.

To the extent *Perez* permitted denationalization in cases other than those involving transferred or divided allegiances, it raised the specter of involuntary statelessness.⁴¹ It was this concern — the possibility of a "man without a country" — that lay at the core of Chief Justice Warren's dissent.⁴² Warren's opinion, joined by Justices Black and

35. 239 U.S. at 312.

36. 356 U.S. at 59.

37. *Perez*, 356 U.S. at 81-82 (Douglas, J., dissenting).

38. 356 U.S. at 58. Frankfurter concluded that the fourteenth amendment placed no limit on Congress' denationalization power. 356 U.S. at 58 n.3.

39. 356 U.S. at 59.

40. 356 U.S. at 60.

41. Indeed the denationalization in *Perez* apparently occasioned statelessness. While *Perez* had voted in a Mexican election, nothing in the record showed that he had ever acquired Mexican citizenship. See Brief for Petitioner at 14-15, *Perez* (stating that *Perez* had not taken on citizenship elsewhere).

42. Statelessness was a problem of significant international concern in the 1950s. Under the auspices of the United Nations Economic and Social Council, an international convention on the status of stateless persons was drafted and opened for signature in 1954. See P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* (2d ed. 1979). In 1951, Hannah Arendt's *The Origins of Totalitarianism* was published, which included a powerful and depressing chapter

Douglas, did more than simply seek to limit Congress' denationalization power to situations involving dual nationality. It rejected outright any power in the government to denationalize without the citizen's consent:

Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be. In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens, and like the alien he might even be subject to deportation and thereby deprived of the right to assert any rights. This government was not established with power to decree this fate.⁴³

According to Warren, this understanding of citizenship was implicit in the structure of the American polity: "This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence."⁴⁴ Protection against denationalization was also explicitly secured by the first section of the fourteenth amendment, which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."⁴⁵ Warren believed that his view undermined neither the earlier federal statutes nor cases such as *Mackenzie*. These could properly be understood in expatriation terms: "[C]onduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship."⁴⁶

Warren's view that the Constitution denied Congress power to denationalize did not prevail for some time. In the intervening years the Court relied on other theories for invalidating denationalization provisions. On the day that *Perez* was announced, the Court, in *Trop v.*

on the twentieth century phenomenon of mass denationalizations. Loss of nationality, according to Arendt, left men and women hopelessly vulnerable: "The Rights of Man, supposedly inalienable, proved to be unenforceable . . . whenever people appeared who were no longer citizens of any sovereign state." H. ARENDT, *supra* note 15, at 293. She concluded:

Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of polity itself expels him from humanity.

Id. at 297.

There is little doubt that the Court was aware of Arendt's work: it was prominently cited in an important law review Note which was cited by Chief Justice Warren's dissent in *Perez*, 356 U.S. at 64 n.4 (citing Note, *supra* note 30).

43. 356 U.S. at 64-65 (footnotes omitted).

44. 356 U.S. at 64.

45. 356 U.S. at 65-66 (quoting U.S. CONST. amend. XIV, § 1).

46. 356 U.S. at 68.

Dulles,⁴⁷ struck down a section of the 1940 Act that provided for the denationalization of U.S. citizens who had been convicted by court-martial of "deserting the military . . . in time of war." There was no majority opinion in *Trop*. Three Justices joined Chief Justice Warren's opinion, which reiterated his view expressed in *Perez* that citizenship could only be lost through voluntary relinquishment.⁴⁸ Recognizing that a majority of the Court had not accepted his assertion in *Perez* that Congress lacked power to denationalize, Warren included an additional reason why the statutory provision was invalid: denationalization, under the facts of the case, constituted cruel and unusual punishment forbidden by the eighth amendment because it rendered the expatriate stateless. Repeating a phrase from his opinion in *Perez*, Warren described denationalization as deprivation of "the right to have rights."⁴⁹ (Justice Brennan provided a fifth vote for invalidation of the provision, concluding that the government had not demonstrated "the requisite rational relation" between expatriation of deserters and the "successful waging of war."⁵⁰)

Obvious problems beset the view that denationalization constituted cruel and unusual punishment — not the least of which was that desertion was a capital offense. Thus the Court adopted different approaches in subsequent cases. *Kennedy v. Mendoza-Martinez*⁵¹ invalidated the denationalization ground added in 1944 that applied to persons who had left the United States to avoid military service. The Court maintained the view that loss of nationality constituted punishment, but it shifted from a substantive objection to a procedural one: such punishment could not be imposed without the constitutional safeguards that normally attend criminal trials.⁵² In *Schneider v. Rusk*,⁵³ the Court struck down a provision that denationalized *naturalized* aliens who returned to their native countries and resided there for three years. In a terse and muddled opinion, Justice Douglas concluded that the statute unconstitutionally discriminated against naturalized citizens.

The true victory for the dissenters in *Perez* came in *Afroyim v.*

47. 356 U.S. 86 (1958).

48. "Citizenship is not a license that expires upon misbehavior. . . . And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be." 356 U.S. at 92-93 (Warren, C.J., plurality opinion).

49. 356 U.S. at 102.

50. 356 U.S. at 107, 114.

51. 372 U.S. 144 (1963).

52. 372 U.S. at 167.

53. 377 U.S. 163 (1964).

Rusk.⁵⁴ After a reign of less than a decade, *Perez* was expressly overruled.⁵⁵ *Afroyim* involved a naturalized U.S. citizen who had moved to Israel and voted in an Israeli legislative election. The State Department thereafter refused to renew his American passport on the ground that he had lost his citizenship under the provision of the 1940 Nationality Act sustained in *Perez*.⁵⁶

Justice Black, writing for the majority, reviewed the history of expatriation in the United States at length, but in the end relied primarily on "the language and the purpose of the Fourteenth Amendment."⁵⁷ The crux of the opinion is a remarkably short and confusing paragraph:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world — as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race.⁵⁸

There are a number of different ideas in this paragraph that arguably are derived from different premises (which remain undisclosed) and may well point in different directions. Some of these will be pursued below. What is most important is what Justice Black thought it all added up to: "Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."⁵⁹

An early decision of the Burger Court led some to believe that *Afroyim* would be short-lived.⁶⁰ But the Court's decision in *Vance v.*

54. 387 U.S. 253 (1967).

55. This quick shift was due in part to a personnel change (Fortas took the seat Frankfurter had occupied and voted with the majority in *Afroyim*) and to Justice Brennan's change in view (he joined the majority opinions in both *Perez* and *Afroyim*). These circumstances offset the fact that Justice Whittaker, who had dissented in *Perez*, had been replaced by Justice White, who dissented in *Afroyim*.

56. 387 U.S. at 254.

57. 387 U.S. at 267.

58. 387 U.S. at 267-68.

59. 387 U.S. at 268.

60. *Rogers v. Bellei*, 401 U.S. 815 (1971) (upholding a statute requiring a U.S. citizen born abroad to come to the United States before the age of 23 and to reside in the United States for five years between the ages of 14 and 28 in order to maintain citizenship; *Afroyim* distinguished as involving a citizen naturalized in the United States and therefore protected by the fourteenth

Terrazas in 1980 reaffirmed the central message of *Afroyim* that loss of citizenship could not occur without proof by the government that an "expatriating act was accompanied by an intent to terminate United States citizenship."⁶¹

In sum, the Court's initial willingness to sustain denationalization statutes gave way in the 1960s to a virtual prohibition on government power to terminate citizenship unilaterally. The Court's shift was apparently based on pragmatic grounds. Alarmed by the eagerness with which Congress had expanded the grounds for denationalization in the 1940s and 1950s, faced with statutes that stripped citizenship on grounds other than sorting out allegiances, concerned about the use of denationalization as a form of punishment, and cognizant of the harms that involuntary statelessness imposed, the Court adopted a prophylactic rule strongly protective of the individual. This development paralleled the Warren Court's protection of other interests it deemed fundamental. As in *Miranda v. Arizona*⁶² and the reapportionment cases,⁶³ a broad rule was adopted to secure important rights and prevent serious harm to individuals in the face of perceived governmental abuse.

The Warren Court doctrine effectively ruled out denationalization on public order or punishment grounds and defined permissible allegiance-based grounds quite narrowly. Furthermore, it adopted an intent-to-relinquish test as the measure of transferred allegiance. The safest way to know whether allegiance had lapsed, the Court seems to have reasoned, was to leave it to the citizen to say so.⁶⁴ In short, the Court collapsed denationalization into expatriation.

In the *Kahane* case, the State Department is not asking for a return to *Perez*, which arguably would support public order grounds of denationalization. Rather, it is seeking to make more coherent the understanding of denationalization in allegiance terms. From the allegiance perspective, the intent-to-relinquish test is overinclusive because it protects people who wish to maintain American citizenship for reasons other than fidelity to the United States. Thus, the Department is

amendment). Congress repealed the statutory provision upheld in *Bellei* in 1978. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046.

61. 444 U.S. 252, 263 (1980).

62. 384 U.S. 436 (1966).

63. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

64. Warren's opinion in *Perez* has been read as hinting at some power in the government to define instances of transferred allegiance, perhaps against the will of the citizen: "[U]nder some circumstances [a citizen] may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country." 356 U.S. at 78. But the Court expressly rejected this interpretation in *Terrazas*. 444 U.S. at 260-61.

arguing for a test of allegiance that asks a decisionmaker to determine where an individual's true allegiance lies. The Board of Appellate Review's decision in *Kahane* accepted the Department's invitation. While the opinion is couched in *Afroyim*'s terms (arguing that Kahane's activities are better indications of his intent to relinquish citizenship than his "self-serving" statements), it in fact applied an allegiance test.

The remainder of this essay will search for the theoretical underpinnings of the rule of *Afroyim* and evaluate the State Department's attempt to modify the doctrine of the Warren Court.

IV. PERSPECTIVES ON LOSS OF CITIZENSHIP

Is there a theory — an understanding of citizenship implicit in our constitutional system — that supports the current doctrine? Chief Justice Warren's dissent in *Perez* and Justice Black's majority opinion in *Afroyim* suggest several views of citizenship worth exploring.

A. *The Rights Perspective*

In *Perez*, Warren describes citizenship as "the right to have rights." Black's majority opinion in *Afroyim* finds "a constitutional right to remain a citizen" of the United States. Understanding citizenship in "rights" terms, at first glance, appears quite reasonable. Citizenship is of fundamental importance to an individual, and its loss can impose substantial harms. It is a status people are willing to make great sacrifices to obtain and defend.⁶⁵ In modern constitutional discourse, calling citizenship a "right" gives it weight; it shifts the burden to the government to come forward with compelling reasons for its actions that abridge or deny citizenship.⁶⁶

Seeing citizenship as a right also provides a basis for the intent-to-relinquish test and the asymmetry of current loss-of-nationality law — that the citizen may expatriate himself (within some narrow exceptions), but Congress may not take citizenship away. Our usual understanding is that while the state may not normally abridge constitutional rights, the individual may waive them. In this light, expatriation is not a right in and of itself; rather, it is the waiver of the right to citizenship.⁶⁷ Thus the rights perspective seems to have sub-

65. [I]t is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

66. See Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 999-1003 (1986); cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 188-92 (1977).

67. If expatriation is viewed as a waiver of a right, then Congress may have some power to impose limits on expatriation. The Supreme Court, in other circumstances, has made clear that

stantial explanatory power. Unfortunately, major difficulties beset a "rights" understanding of citizenship.

From where might such a "right to citizenship" derive? The Court in *Afroyim* points to the fourteenth amendment. But the message from the fourteenth amendment is hardly clear. The amendment does not speak in "rights" terms; nor does it purport to limit governmental power regarding acquisition or loss of citizenship. The citizenship clause was primarily intended to disavow Justice Taney's conclusion in *Dred Scott* that black Americans were not citizens.⁶⁸ Thus it is not surprising that the amendment reads like a definition. To be sure, certain rights may flow from holding the status of "citizen." But that does not make citizenship itself a "right." To see this, imagine that the Constitution were amended to define "person" — perhaps in response to the abortion debate. Although we might then talk about the rights that such constitutionally defined persons would have (such as the right not to lose one's life without due process), we would not talk about "personhood" as a right.⁶⁹

If the fourteenth amendment does not do much to establish an irrevocable right to citizenship, perhaps the importance of the interest argues for such a result. The claim would be that citizenship is a "fundamental right" protected by a substantive reading of the fifth amendment's due process clause⁷⁰ or, perhaps, implicit in the structure of the American constitutional system.⁷¹

The denationalization cases may be exercises in substantive due process, but they do not read that way. Typically, in a substantive due process case, the Court will define the individual interest at stake and then examine the nature and strength of competing government interests. But in the denationalization cases there is no careful balancing, no discussion of less burdensome alternatives. It is as if the Court

possession of a right does not entail an automatic right to waive it. See *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979) (right to public trial); *Singer v. United States*, 380 U.S. 24 (1965) (right to jury trial). Accordingly, it would not do violence to the rights perspective to recognize congressional limits on expatriation — perhaps in wartime (the 1907 Act contained such a provision), or to prevent avoidance of obligations owed the state. Cf. *Di Portanova v. United States*, 690 F.2d 169 (Ct. Cl. 1982) (refusing to recognize, under the federal tax laws, purported expatriation that would have reduced individual's tax liability). In fact, U.S. law currently restricts the expatriation of individuals. INA § 351(a), 8 U.S.C. § 1483(a) (1982).

68. *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898).

69. Furthermore, as Justice Harlan noted in his dissent in *Afroyim*, 387 U.S. at 279-80, Congress approved a bill — just two years before it passed the fourteenth amendment — that would have denationalized rebel office holders. (The bill did not become law because Lincoln failed to sign it before Congress adjourned.) Such action is evidence that the fourteenth amendment was not seen by its adopters as depriving the government of the power to denationalize.

70. Cf. *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Roe v. Wade*, 410 U.S. 113 (1973).

71. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

viewed citizenship as some kind of "super-right" — one that cannot be balanced away. This seems to be what Chief Justice Warren was driving at when he described citizenship as "the right to have rights."⁷²

But Warren's characterization is a dramatic overstatement of the importance of citizenship in the United States today.⁷³ Aliens residing in the United States — even illegal aliens — are protected by the Constitution. They are entitled to nearly all the public and private opportunities and benefits afforded citizens.⁷⁴ The deportation of aliens is significantly constrained by the fifth amendment's due process clause. A central benefit of citizenship in other countries — the ability to transmit citizenship to one's children — is far less important in the United States because, by virtue of the fourteenth amendment, children born to aliens in this country are automatically American citizens. Citizenship, of course, does carry with it certain benefits, including the ability to travel on a U.S. passport, to claim protection by the U.S. government overseas, and the right to vote and hold office. But it is far more accurate to adopt the characterization of citizenship employed by the Court in recent equal protection cases — as membership in the political community entitling a person to exercise part of the sovereign power of the nation⁷⁵ — than to describe it as the "right to have rights." It is primarily residence in the United States, not citizenship, that affords rights to individuals.

One may properly respond that denationalization threatens residence in the United States as well. This is possible when grounds for denationalization of citizens are also grounds for deportation of aliens. For example, a citizen convicted of conspiring to overthrow the United States government may be denationalized;⁷⁶ after loss of citizenship, the person (now an alien) is deportable under several provisions of the immigration laws.⁷⁷ Perhaps in this derivative fashion, there is some truth to Warren's claim that one's ability to enjoy constitutional rights in the United States is secure only if one is a citizen.

72. *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (Warren, C.J., plurality opinion). Similarly, Justice Douglas, dissenting in *Perez*, asserted: "Citizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms. The power of Congress to withhold it, modify it, or cancel it does not exist." 356 U.S. at 84.

73. See generally A. BICKEL, *THE MORALITY OF CONSENT* 33-54 (1975).

74. This is so, as a constitutional matter, for the states. While weaker constitutional limits are imposed on the federal government, Congress has excluded permanent resident aliens from few federal programs. Perhaps the severest current disabilities are lack of the franchise and ineligibility for the federal civil service.

75. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

76. INA § 349(a)(7), 8 U.S.C. § 1481(a)(7) (1982).

77. INA § 241(a)(6), (7), 8 U.S.C. § 1251(a)(6), (7) (1982).

But I would urge caution in reaching this conclusion for several reasons. First, the Court's fear that denationalization can create "rightless" people is in large part due to its own unwillingness to impose any substantive limits on Congress' power to deport aliens.⁷⁸ There is something quite peculiar about our constitutional doctrine here. Although permanent resident aliens are entitled to nearly all the rights and privileges that citizens enjoy, Congress has *no* power to remove citizenship and virtually *plenary* power to deport aliens. If restrictions on loss of citizenship are based on the deprivations denationalization entails, then some limits ought to be placed on deportation, because it is the removal of the person from the United States that occasions the severest injuries.

Second, aliens are not (yet) deported to outer space or Devil's Island. The United States must find some other country to accept them.⁷⁹ Deported aliens are at least entitled to the rights the receiving country extends to aliens. These may not be many, but they are likely to be a far cry from Warren's description of denationalization as "the total destruction of the individual's status in organized society."⁸⁰

Finally, and most important, denationalization can hardly be said to entail loss of the "rights to have rights" when it does not bring about statelessness. Many of the denationalization grounds contemplate the acquisition or existence of citizenship elsewhere. Dual nationals (Rabbi Kahane, for example) certainly have the right to have rights in another polity. Thus while Warren's cataclysmic characterization might have been true for Perez and Trop, it was hardly apt for Afroyim (who could qualify as an Israeli citizen under the Law of Return) and Terrazas (who had taken Mexican nationality).

In sum, Chief Justice Warren may have been correct that denationalization sometimes imposes serious, even devastating, harms on individuals. But moving from this insight to an absolute right of citizenship is problematic.⁸¹ Most fundamentally, it seems particularly inappropriate to conceive of citizenship in rights terms at all.

78. See T.A. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 349-69 (1985).

79. Aliens for whom a country of deportation is not located within six months must be released from detention. INA § 242(c), (d), 8 U.S.C. § 1252(c), (d) (1982).

80. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

81. Nor can any theory of proportionality or balancing get us there either. Perhaps such theories can explain why it strikes us as unjust to take away citizenship from someone who fails to pay taxes or violates the speed limit. But once we are dealing with conduct that is a capital offense, it is hard to see how denationalization can be a disproportionate response. See (oddly enough) Warren's opinion in *Trop v. Dulles*, 356 U.S. 86, 99 (1958) ("Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime.").

Citizenship is not a *right held against* the state; it is a *relationship with* the state or, perhaps, a *relationship among* persons in the state. It is membership in a common venture.⁸² The notion that membership decisions can turn simply on the will of an individual — and allow no role for other members or the group as a whole — ought to strike us as odd.

These considerations suggest that the rights perspective cannot provide an adequate account of citizenship and denationalization — even if it does explain the prevailing doctrine. We must look elsewhere for a satisfactory theoretical foundation for our current constitutional principles.⁸³

B. *The Consent Perspective*

Citizenship is sometimes conceived of as membership in a state generated by mutual consent of a person and the state. Consent theory posits a world of mature human beings able to make thoughtful choices about with whom, and where, they would like to live. Citizenship, in this view, takes on a special quality because it is the product of free, conscious choice, not simply an unplanned event or an accident of birth. The act of choosing a certain relationship — for example, a spouse — may make the choice and the ensuing relationship far more significant than if we find ourselves in it through no will of our own — say, an arranged marriage.⁸⁴ Indeed, two consent theorists, in an important new book, argue that consensually based citizenship is “more likely to generate a genuine sense of community among all citizens than the existing scheme [of citizenship determined simply by birth in the United States].”⁸⁵

82. See M. WALZER, SPHERES OF JUSTICE 31-63 (1983); Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 190-208 (1983).

83. One might assert that I underestimate the difference between aliens and citizens by failing to appreciate the importance of the right to vote and hold elective office. These rights, it may be argued, empower a person to contribute to the creation of new rights and the maintenance of existing ones. They also give a person potential influence with officials (other than judges) who protect and establish rights. There may be, therefore, a strong link between rights of political participation (and therefore citizenship) and the enjoyment of other rights.

While I do not deny these claims, it should be recognized that resident aliens are protected by most constitutional guarantees, and they may enforce these rights in court whether or not they can vote. Furthermore, under modern equal protection analysis, *see, e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971), it is difficult for states to restrict benefits and opportunities to citizens. Thus it would be wrong to see political rights as the only guarantee of other rights.

84. We may also have a need to believe that we have made the right choice, which may lead us to defend staunchly that which we have chosen.

85. P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT 5 (1985). The primary argument of Professors Schuck and Smith's book is that the children of illegal aliens born in the United States should not automatically be deemed American citizens. This is said to follow from

Whatever the merits of seeing citizenship in consent terms,⁸⁶ it cannot explain the current constitutional doctrine regarding denationalization. As Professors Schuck and Smith concede, "a thoroughgoing commitment to pure consensual membership might seem to imply a national power to denationalize citizens at will." In other words, consent is a two-way street with both entrances and exits.⁸⁷ If a citizen's right to expatriate himself rests upon the significance of mutual consent to the relationship, it is hard to see how the state can be denied the same right to withdraw consent through denationalization. Thus the consent perspective seems dramatically inconsistent with the asymmetry of the right to "de-consent" produced by *Afroyim*.⁸⁸

It might be argued that the citizen and the state do not consent on equal terms. For example, citizenship might be analogized to the granting of tenure: the institution is virtually prohibited from revoking consent, but the tenured individual remains quite free to leave. But this description is not satisfactory. To assert that this asymmetrical situation exists is either a statement about the intent of the parties or about external limits on the government's freedom to consent on its own terms. The existence of denationalization statutes undercuts the first alternative; such laws make clear that the government does not enter into an agreement believing it is terminable only by the individual. The second alternative takes us beyond the consent perspective because it posits a constitutional principle that forces the government to "consent" in a particular way. If this is so, the consent perspective has added nothing; we must still search for an independent constitutional reason — not based on the government's consent — for prohibiting denationalization.

consent theory because the United States has not consented to the presence of illegal aliens and therefore has not consented to the citizenship of their children.

86. While I fundamentally disagree with Professors Schuck and Smith, I will not pursue criticism of their work here beyond stating that I do not view birthright citizenship to be "something of a bastard concept in American ideology." *Id.* at 2. I see birthright citizenship as a concept of impeccable pedigree and of great importance to the American polity. For a trenchant critique of Schuck and Smith's book, see Martin, *Membership and Consent: Abstract or Organic?* (Book Review), 11 YALE J. INTL. L. 278 (1985).

87. Consensual entry into a relationship does not necessarily imply a right of either party to terminate the relationship at will. Marriage laws are the obvious example. Thus, one could imagine a version of the consent perspective that supports consensual attainment of citizenship followed by perpetual allegiance. This, of course, does not aptly describe American nationality rules.

88. Schuck and Smith seek to avoid this result by arguing that "a power [to denationalize] might threaten the vigorous exercise of basic constitutional freedoms, such as First Amendment political rights, or might create a condition of involuntary statelessness and thus of acute human vulnerability." P. SCHUCK & R. SMITH, *supra* note 85, at 125. While I share their fears about the exercise of power to denationalize, I fail to see how they can deny such a power under a consent theory that includes a right of expatriation. Their conclusion bears the appearance of an ad hoc exception that seriously undermines the theory.

C. *The Contractarian Perspective*

Dissenting in *Perez*, Chief Justice Warren examined denationalization from the perspective of the underlying political philosophy of those who founded the nation:

What is this Government, whose power is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, "Governments are instituted among Men, deriving their just powers from the consent of the governed." I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government. This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.⁸⁹

One interpretation of Warren's argument is that it is an application of contract theory — that is, a perspective that focuses on agreements among individuals made in the process of creating a state. (Contract theory, as I am using it, looks to agreements among individuals; consent theory looks to agreements between an individual and the state.)

Contract theory may be a sensible perspective for thinking about citizenship and denationalization because membership is a question that precedes, or at least accompanies, the formation of a state. Some group of human beings must come together to form a government, and that group must have some understanding of what constitutes them as a group. That notions of membership may exist prior to a constitution is evident in Warren's quotation of the *Declaration of Independence* in the paragraph above; he is relying upon the underlying assumptions and principles regarding membership that informed the creation of the government of the United States.⁹⁰

Contract theory has added attractions for constitutional interpretation. A focus on an original contract provides stability and legitimacy to the development of constitutional law. Doctrine is seen not as the willful act of judges or other government officials, but as a reflection of an earlier agreement; at least at some point, it can be argued, somebody assented to this exercise of government power.⁹¹ Finally,

89. *Perez v. Brownell*, 356 U.S. 44, 64 (1958).

90. See also M. WALZER, *supra* note 82, at 31 ("[W]hat we do with regard to membership structures all our other distributive choices: it determines with whom we make those choices, from whom we require obedience and collect taxes, to whom we allocate goods and services."); B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 89-95 (1980).

91. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 376 (1981). For critiques of "originalist" interpretation, see, for example, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

contract analysis is a fashionable way to derive and explore principles of moral philosophy. To the extent such principles may inform our understanding of constitutional rights and legitimate government power, contract theory may be a useful method of contemplation.⁹²

We can take contract theory in two directions. Either we could ask what agreement we believe the framers of our social contract — the Constitution — reached regarding citizenship; or we could investigate the agreement that a hypothetical group of founders, similar to us and sharing our basic political philosophy, would reach were they asked to address the question. This latter inquiry would support a more present-minded approach to our Constitution — one not wedded to the “original intent” of the framers, but rather searching for current understandings of the fundamental constitutional principles of our political community.

I will not pursue the first line of inquiry here, as it is well-traveled ground.⁹³ It is sufficient to note that the prevailing view at the time of the drafting of the Constitution was that citizenship was acquired by birth or naturalization and could be lost only with the consent of the sovereign.⁹⁴ As to denationalization, we have little evidence either way.

The second version of contract theory is the more interesting, given the difficulties of discerning the framers’ intentions about modern constitutional questions. The project here is to ask: How might a hypothetical group of people interested in creating a political community construct rules regarding attainment and loss of membership? Admittedly, this kind of analysis may produce any number of answers, depending on the characteristics and beliefs with which one endows the hypothetical founders. Not surprisingly, lawyers playing this game in the early days of the Republic were able to argue that contract theory supported both sides of the question on the right of expatria-

92. Professor David Richards has used John Rawls’ notion of the original position to derive principles of constitutional law. See, e.g., Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

93. For detailed analyses, see J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* (1978); P. SCHUCK & R. SMITH, *supra* note 85; I. TSIANG, *THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907* (1942); Borchard, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INTL. L. 312 (1931); Duvall, *Expatriation Under United States Law*, Perez to Afroyim: *The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408 (1970); Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315 (1965); Morrow, *The Early American Attitude Toward the Doctrine of Expatriation*, 26 AM. J. INTL. L. 552 (1932); Roche, *supra* note 23.

94. Several important issues, of course, remained highly uncertain — such as the status of Indians, slaves, and free blacks. It took a civil war and the fourteenth amendment to provide some of the answers. See generally J. KETTNER, *supra* note 93.

tion.⁹⁵ With this caveat, let me explore the manner in which a set of founders, living in the present, might talk about loss of citizenship.

First, it seems reasonable that those creating a nation would seek to ensure that they will be counted as members once the state comes into being. It is further likely that they will want their children to be members as well. Thus, I will assume that there will be agreement that the children of citizens will be citizens. No doubt the state will want some mechanism for making new members — that is, some kind of naturalization law. It is conceivable that the founders might wish to restrict the rights of naturalized citizens, including their ability to transmit citizenship to their children. But, endowing these founders with modern notions of equality and concerns about “second-class citizenship,”⁹⁶ I will posit that they would treat native-born and naturalized citizens alike.⁹⁷

The notion of citizenship by birth and naturalization does not entail perpetual allegiance. It seems sensible that the founders would not want to force a person to remain within the state against his will — at least, absent a claim that the person ought to be punished or owes a debt that ought to be repaid. Recognition of some kind of right of expatriation is therefore likely.⁹⁸

The denationalization question, however, is not easily resolved in this thought experiment. One can imagine arguments against a broad power to denationalize that might be persuasive to the founders. If denationalization were viewed merely as an exercise of ordinary politics, majorities could tyrannize minorities by threatening them with loss of citizenship. Or, less perniciously, denationalization could be seen as a convenient means of achieving domestic or foreign policy objectives. Simple self-interest coupled with the recognition that they might not always find themselves in the majority ought to lead (reasonably risk-averse) founders to be concerned about malicious or casual resort to a denationalization power.

Perhaps these considerations would produce agreement that dena-

95. Compare the arguments of counsel in *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 139 (1795) (right of expatriation “is implied . . . in the nature and object of the social compact”), with Chief Justice Ellsworth’s charge to the jury in *Williams’ Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708) (contract theory entails that “members cannot dissolve [the] compact, without the consent or default of the community”).

96. *Cf. Schneider v. Rusk*, 377 U.S. 163 (1964).

97. *But see Rogers v. Bellei*, 401 U.S. 815 (1971).

98. The United States formally recognized such a right by passing the Expatriation Act of 1868, ch. 249, 15 Stat. 223. *But see* P. SCHUCK & R. SMITH, *supra* note 85, at 87-88 (noting that some constraints on expatriation were thought reasonable even after the 1868 Act); INA § 349(a)(6), 8 U.S.C. § 1481(a)(6) (1982) (renunciation of American citizenship in the United States permitted only in wartime and with approval of the Attorney General).

tionalization on "public order grounds" should be prohibited — or, at least, not permitted without a very strong justification by the state.⁹⁹ But is there any reason to believe that the hypothetical contractors would not allow denationalization for at least some of the allegiance categories? They might well conclude that, if a person shows himself to be fundamentally opposed to the core principles of the society, he has surrendered any right he has to remain within it. Excommunication, of course, is an old tradition. Furthermore, the founders could well wish that members be willing to undertake obligations necessary for the survival (or smooth functioning?) of the state. Anyone who does not undertake such obligations, they might believe, ought not to be able to claim the benefits of living in their state. These arguments might support a denationalization power for citizens demonstrating a lack of allegiance — as evidenced, perhaps, by treason, armed insurrection, espionage on behalf of a foreign power, draft evasion, and desertion. Similarly, it is not clear why the contractors would protect the continued membership of citizens who have transferred or divided their allegiance. Abandonment and adultery are traditional grounds for terminating marriages.

If this discussion presents a plausible draft of a founding contract, then we have gone far beyond the rule of *Afroyim* that citizenship may be lost only when a citizen intends to relinquish it. Accordingly, I find little in either version of contract analysis to support Chief Justice Warren's claim that "a government conceived in the spirit of ours was [not] established with power to take from the people their most basic right."¹⁰⁰ There may well be some limits on the denationalization power. But the notion of citizenship absolutely unrevokable by the state does not seem to follow from contract theory.

99. Nor is it likely that the hypothetical framers would authorize denationalization on "punishment" grounds — at least not for most offenses. Principles of proportionality and rehabilitation ought to be given substantial weight. As a rule, this society has asked people to "pay their debt" to society and then return. Congress has never passed a law authorizing the deportation of citizens. Of course, the denationalization laws of the 1940s and 1950s may be cited as strong evidence for the view that this society tolerates denationalization as punishment. But both the historical context of the statutes and the fact that most were struck down by the Supreme Court suggest that such laws are not the best evidence of fundamental societal principles.

100. *Perez v. Brownell*, 356 U.S. 44, 64 (1958). It might be argued that, in the quoted remark, Warren is not referring to contract theory at all. Rather, he is appealing to the fundamental (even if long forgotten) constitutional principle that the federal government is a government of delegated powers. Where, Warren might be asking, does the Constitution give Congress the power to denationalize? Of course, under modern constitutional law there is no problem with this question: all denationalization grounds may be explained with a straight face as necessary and proper to the execution of a delegated or well-established implied power. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 212 (1963) (Stewart, J., dissenting) (war power); *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (foreign affairs power).

D. *The Communitarian Perspective*

"Citizenship in this Nation is a part of a cooperative affair," wrote Justice Black in *Afroyim*. "Its citizenry is the country and the country is its citizenry."¹⁰¹ This may appear to be a vacuous tautology, or even a frightening appeal to some notion of a "fatherland." But it may also be read as an appeal to a communitarian perspective on citizenship.

Communitarianism is a hazy term used to describe any number of different political theories, which may range from conservative Burkean notions to radical left conceptions of the state. Several ideas, however, that seem central to most accounts, are relevant to an understanding of citizenship. Communitarian theory begins with individuals situated in a real society, not in a hypothetical state of nature or on the brink of contract. The individual is seen as an "encumbered" self.¹⁰² He is defined — or constituted — in part by his relationships, roles, and allegiances. His relationship with the state is based on his identification with and immersion in the society's history, traditions, and core assumptions and purposes. If the bywords of liberal theory are freedom, choice, and consent, the bywords of communitarian theory are solidarity, responsibility, and civic virtue. The operative metaphors for the state are "family," "community," or "a people." From the communitarian perspective, citizenship is seen as an organic relationship between the citizen and the state.

The claim here is *not* that either the Constitution or American society is communitarian (however we choose to define that term). Rather, I am suggesting that thinking about membership from a communitarian perspective may shed some light on our current understandings of citizenship. Thus the analysis that follows is not necessarily one to which a committed communitarian living in a communitarian society would subscribe. The project here is to examine the underpinnings of doctrine in our liberal democratic constitutional system.

The communitarian perspective is grounded in the fourteenth amendment's citizenship clause. The vast majority of American citizens attain citizenship by birth, not by choice or consent. By the time most Americans are old enough to understand the concepts of loyalty or allegiance, they have already developed a conception of self that incorporates American citizenship. Of course nationality may be cast

101. 387 U.S. at 268.

102. I borrow this term from Michael Sandel. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984).

off, just as one's family or religion may be abandoned. But for the most part, we live our lives within the identifications into which we are born. Change of nationality, like conversion, is a noteworthy occurrence. Indeed, no more than one thousand U.S. citizens expatriate themselves each year.¹⁰³ Modern consent theorists may view birthright citizenship as "something of a bastard concept in American ideology,"¹⁰⁴ but to most of us, birthright citizenship is simply a recognition that human beings are constituted by, and constitutive of, the society in which they are raised.¹⁰⁵

Viewing citizenship in communitarian terms brings to light two considerations that support limits on denationalization. The first derives from the description of the harm that denationalization may impose on individuals. As previously discussed, the rights perspective has improperly characterized that harm as loss of "the right to have rights." The communitarian perspective sees the harm differently: Denationalization may grossly intrude upon a person's conception of self. It is akin to forced conversion. When the state strips an individual of her citizenship, it may well be tearing the self apart.¹⁰⁶

This may sound like an overstatement, but test the proposition in your mind. Imagine that you awake one morning to find that your American citizenship has been taken away. What springs to mind? That travel to Europe may be difficult without an American passport? That no country will seek your release if you become a hostage overseas? That it will be impossible to vote in the next presidential election? I doubt that any of these issues are on the top of your concern

103. Letter to the author from George M. Scanlon, United States Department of State (Nov. 21, 1985) (transmitting loss of nationality statistics for fiscal years 1983-1985) (on file at Michigan Law Review); see also 1984 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 177.

104. P. SCHUCK & R. SMITH, *supra* note 85, at 2.

105. Compare Michael Sandel's attack on the liberal view of the "unencumbered self": Can we view ourselves as independent selves, independent in the sense that our identity is never tied to our aims and attachments?

I do not think we can, at least not without cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are — as members of this family or community or nation or people, as bearers of that history, as citizens of this republic. Allegiances such as these . . . go beyond the obligations I voluntarily incur and the "natural duties" I owe to human beings as such. They allow that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments that, taken together, partly define the person I am. Sandel, *supra* note 102, at 90.

106. To the extent "the country is its citizenry," *Afroyim*, 387 U.S. at 268, the state may also be tearing itself apart when it denationalizes. Denying a state the power to cast off its constituent parts may be likened to prohibiting a person from dismembering himself. I recognize, however, that metaphors may be invoked on both sides: perhaps denationalization is the removal of a malignant cancer — a constituent part gone mad that threatens the health of the body politic. See text at notes 109-11 *infra*.

list. More likely, you feel violated, naked. You ask, how can I be not an American? What am I, then? A part of oneself is gone.

A second argument against denationalization from the communitarian perspective flows from the state's responsibility for the individuals it has helped to constitute. An analogy to the family may help here. Leaving legal obligations aside, it seems common moral ground that parents are responsible for the care, security, and education of their children. Children, after all, do not choose to be brought into the world; they exist because of the choices (or at least the acts) of others. Much of who the children are is a product of the parents' choices. A child's moral, political, and religious beliefs, notions of responsibility and the good — at least until the child reaches maturity — are primarily based on the lessons, either intended or unintended, of the family. I believe that these considerations create a strong basis for a moral principle that parents may not throw a child out or turn him away (even though the child may be free to walk away). Parents are deemed responsible for their children in both senses of that word: they have made the children who they are and they must take responsibility for their creations.

While the leap from family to state is not unproblematic, I think the analogy is permissible here. The state has helped to endow the citizen with a set of values and relationships that precede any conscious choice by the citizen (at least a citizen at birth). In much the same way that the parent is responsible for the child, so the state is responsible for the citizen.¹⁰⁷ Under this reasoning the state — like the family — could punish, but it could not banish.¹⁰⁸

Understanding citizenship from a communitarian perspective thus lends support to the Court's results in the loss-of-citizenship cases. It provides a basis for a strong presumption against a power to denation-

107. I do not mean to suggest a totally deterministic position — one that might, for example, hold society entirely responsible for the acts of individuals. The argument is not that society "should be blamed" for what person *X* does to person *Y*. Rather, it is that the state may not abandon a person for whom it is responsible simply because the state deems it convenient to do so.

108. As stated before, I am not suggesting that the United States is organized on communitarian principles. A communitarian society may have additional reasons for disfavoring denationalization. Communitarianism ought to seek ways of fostering dedication to communal projects. To do so, it needs to encourage conversation among differing views to work toward some kind of common ground. Threatening the expulsion of dissenters seems unlikely to generate genuine commitment to the polity and its aspirations. Furthermore, egregious misconduct on the part of some members of society ought to be understood as a signal to the state that something is seriously wrong in the body politic. Allowing the state to denationalize at will permits it too easily to avoid the problems it ought to be addressing. These arguments may carry less weight in a liberal society.

alize. But it is doubtful that communitarian analysis takes us as far as the intent-to-relinquish test of *Afroyim* and *Terrazas*.

Why, from the communitarian perspective, must a state tolerate the continued membership of a disloyal citizen — a person who has made clear that he has no commitment to (or outright disdain for) the society's core principles? The analogy of family responsibility can take us only so far. At some point, a child grows up and assumes responsibility for his actions. To be sure, his views and conduct will be heavily influenced by the family milieu from which he came. But if, as a mature adult, he condemns the family's mores and announces that he feels no responsibility toward family members or goals, it hardly seems immoral for the family to state that the ties that bound have been severed. Disinheritance may be harsh, but it isn't always unjust.¹⁰⁹

Furthermore, where the citizen has, in effect, declared war on society, the claim that denationalization destroys one's concept of self is much less persuasive.¹¹⁰ The citizen's actions may be the best signal that the individual's conception of self does not include attachment to the core principles of society. In such a case, denationalization may simply ratify an unfortunate social fact; it would not sever the self. Thus, denationalization could be a justifiable response to treason or subversion, and perhaps even to desertion in wartime.

This reasoning would also tolerate denationalization in the case of transferred loyalty. The denationalized individual may lose the benefits of United States citizenship, but there should be little or no harm to the person's conception of self. Nor need the society feel responsibility for someone who has disavowed it.

Divided loyalty presents a more difficult case. On the one hand, we live in a world of overlapping and multiple allegiances — to ethnic group, home town, occupation, and baseball team. To stretch the family analogy perhaps to the breaking point, divided allegiance may be no more troubling than holding allegiance to one's own family and one's "in-laws." At some point, however, the demands of conflicting loyalties may necessitate choice. (A person can fight for only one of two opposing armies.) It is not clear why a community, under the communitarian perspective, may not put a citizen to a choice when there exists an inescapable conflict in allegiances. In such a situation, the individual will suffer harm no matter what; conditions demand

109. Consider the Sholem Aleichem story about Tevye the Dairyman who declares his daughter Chava dead for having married a Gentile. Her act was so foreign to the core identity and meaning of the family that she was no longer recognized as a member.

110. Indeed, society may be the more aggrieved. "How sharper than a serpent's tooth . . ."

that some part of self be sacrificed. The best that can be done is that the citizen be given a choice.

The arguments from harm and responsibility would not seem to permit denationalization as a routine form of punishment — say, for failure to pay taxes, or for burglary. A communitarian perspective ought to recognize, to some extent, social causes of crime; and forgiveness for even serious misconduct is a central feature of family relationships. Under the rights perspective, Chief Justice Warren's conclusion that denationalization is cruel and unusual punishment seemed vulnerable. But the communitarian perspective exposes both the cruel (destruction of self) and unusual (families forgive, they don't banish) aspects of punishment. These considerations may explain why this nation has rarely used denationalization as a form of punishment (and, interestingly, has done so only for loyalty-related crimes). Yet, at some point, I can imagine the communitarian argument running out. Some conduct may be so egregious, so outside the bounds of tolerable behavior, that the perpetrator may be seen as having disassociated himself from the community. "If he did that," the parent may conclude in extreme situations, "he is no son of mine." Or a club may feel justified in expelling the treasurer who embezzles funds. Unfortunately, given the range of heinous crimes that this nation regularly experiences, it is not easy to say what acts would be so *outré* as to be "un-American." It may be that denationalization-as-punishment under the communitarian perspective makes sense only in closely knit, homogeneous communities.

Finally, it is unlikely that a communitarian perspective, in the American context, would support denationalization on "public order" grounds. The harm and responsibility arguments have great force in situations where a citizen remains loyal to the state. Furthermore, other constitutional principles (such as the first amendment and the equal protection clause) would create insuperable barriers to attempts to expel groups.¹¹¹

In sum, the communitarian perspective may do a good job of describing our intuitions about citizenship and the dramatic harm that denationalization entails. But it cannot serve as a foundation for constitutional principles that leave loss of citizenship solely to the individual.

111. Again, one can imagine that in a communitarian, rather than a liberal, society, public order grounds might be far more acceptable. To a society intent on preserving a particular religious, ethnic, or political character, groups that do not fit the mold are a threat to the community's conception of self.

V. BEYOND INTENT-TO-RELINQUISH

None of the perspectives we have examined provides an adequate theoretical foundation for the intent-to-relinquish test of *Afroyim* and *Terrazas*. The rights perspective gets us to the doctrine, but it is internally incoherent. Consent takes us no place. Contract and communitarian theory cannot rule out state power to terminate citizenship against the will of the individual. Perhaps there are other possible bases for the current doctrine, but I am fairly convinced that the intent standard rests on no sound constitutional theory. The test seems to proceed from the Court's mistaken view that statelessness is a fate worse than death,¹¹² and its fear that the state would abuse any denationalization power it is recognized to have. *Afroyim* provides a bright-line prophylactic rule: to avoid serious harm and government overreaching, leave loss of citizenship to the individual.

Our inability to find solid theoretical justifications for the current doctrine does not establish that the doctrine should be discarded. In a liberal democracy it may be appropriate to craft doctrine *in favorem libertatis*, and prophylactic rules are justifiable on efficiency terms. But I am not satisfied with this position. To me, the rule of *Afroyim* is based on a mistake of fact and an unsatisfactory rights logic. By conceptualizing citizenship in rights terms, the current doctrine fails to capture the essential relational or organic nature of citizenship. Such thinking drives a false wedge between citizen and state and runs counter to our deepest intuitions about the nature of allegiances.

The contract and communitarian perspectives, teased out of the Court's own language, start with an understanding of citizenship as a relationship among people or between people and the state. Both also provide a basis for the centrality of birthright citizenship in American nationality law.¹¹³ Communitarian theory has the added benefit of offering a coherent explanation for the (almost unconscious) importance most of us attach to citizenship.

Yet neither perspective is compatible with the Court's answers in the denationalization cases. To the extent we are satisfied with the contractarian or communitarian explanation of citizenship, the doctrine ought to be adjusted to allow the state some authority to denationalize citizens.

Such a change in doctrine may mean a greater change in conceptualization than in result. Both perspectives support a strong presump-

112. Quite literally, given the Court's willingness to accept execution, but not denationalization, of deserters.

113. At least for children of citizens.

tion against the state's power to denationalize and would maintain much of the current doctrine's asymmetry. And neither perspective goes very far toward supporting denationalization on punishment or public order grounds. The contractarian and communitarian perspectives would, however, seem to permit denationalization for transfer of loyalty, disloyalty, and, in some cases, divided loyalty.

Unfortunately, fancy theory does not usually suggest concrete doctrine; and fancy theory only vaguely related to the document it purports to explain may (to update an old cliché) have the hum of the word processor. The problem, of course, is to turn the insights of the contractarian and communitarian approaches into constitutional doctrine. The thrust of both analyses is reorientation of doctrine away from intent-to-relinquish and toward notions of allegiance. But there are very serious risks in making this move without careful thought.

Shifting to an allegiance-based understanding of denationalization will naturally lead to government investigations of the loyalty of citizens. The State Department's brief in the *Kahane* case is an ugly example of what can happen when constitutional standards turn on proof of allegiance. The Department combed Kahane's speeches and writings in an attempt to prove that his true allegiance lay with Israel.¹¹⁴ The chilling effect that such an approach may have on speech and conduct ought to be apparent. We are not so many years beyond the McCarthy era, when minor incidents were taken as proof of disloyalty. And how many Americans, in opposing the war in Vietnam, were told to "go back to Russia"? I do not think I am being unduly alarmist to suggest that the State Department's brief in the *Kahane* case takes us a few steps down the wrong road.¹¹⁵

One answer — and I think the correct one — is to insist that denationalization be based on conduct, not belief. That is, Congress ought to be restricted to identifying specific acts that demonstrate lapsed, transferred, or divided allegiance. But even here we must be careful. Past experience indicates that Congress might either make too-easy assumptions that particular conduct evidences lost allegiance (e.g., desertion), or disguise public order grounds as allegiance grounds (e.g., voting in a foreign election). The history of the denationalization statutes, combined with the harms imposed by loss of nationality, suggests that the Court ought not to defer to congressional judgments as to what conduct constitutes a loss of allegiance. It should insist that de-

114. See State Department Brief, *supra* note 5, at 25-30.

115. Of course, proving only transfer of allegiance is not enough. The government must also show that the citizen has performed one of the expatriating acts identified in section 349 of the INA, 8 U.S.C. § 1481 (1982).

nationalization categories fit as perfectly as possible allegiance-based justifications for loss of citizenship.

Under this analysis, it may be possible to craft narrow denationalization grounds for transferred allegiance. For example, Congress ought to be able to provide for loss of nationality when a citizen has voluntarily renounced U.S. citizenship, particularly if he or she has taken citizenship elsewhere.¹¹⁶ But naturalization in another country, by itself, can hardly be deemed to indicate a transfer of allegiance. People may seek citizenship in other countries in order to remain with family members or obtain employment. Such conduct in many (if not most) cases says little about continued allegiance to the United States. Other conduct, such as service in a foreign military or voting abroad, is equally unreliable evidence of transferred allegiance.

It may be difficult to define categories of conduct evidencing loss of allegiance. Perhaps joining the army of an invading enemy or working for the violent overthrow of the state may properly be seen as indicating no further attachment to the community. But even here, as several readers of this article have suggested, such assumptions are problematic. If allegiance is understood not as loyalty to the government but rather as attachment to the core principles of a community, then aiding in the overthrow of a government that had demonstrated a "lack of allegiance" to the Constitution would indicate no loss of allegiance. Beyond these treason-type grounds, it is even harder to identify conduct that necessarily demonstrates lapsed allegiance. Tax evaders, deserters in wartime, and participants in organized crime may be contemptible citizens, but it is quite clear that people may engage in these activities without having lost allegiance to this country.¹¹⁷ The prior analysis suggests that neither overinclusive categories nor specific inquiries into allegiance ought to be tolerated.¹¹⁸

A similar approach ought to be applied to divided allegiance situations. We ought to be suspicious of governmental assertions about the degree of allegiance a citizen holds. However, some objective indicia may disclose cases where the maintenance of two allegiances becomes untenable. The State Department's Board of Appellate Review has adopted this kind of test in ruling on denationalization cases following

116. Here the intent-to-relinquish and allegiance-based theories would overlap.

117. Consider, for example, the facts in *Trop v. Dulles*, 356 U.S. 86 (1958). Trop was a private in the U.S. Army serving in French Morocco. He had been placed in a stockade due to a breach of discipline. He escaped from confinement, but willingly surrendered to an officer on an Army vehicle while he was walking back towards his base. His "desertion" lasted less than a day.

118. I recognize that this is as much a prophylactic rule as the one derived from the rights perspective. But at least it is based on a plausible account of both citizenship and the real world.

Terrazas. According to a study of more than one hundred Board decisions, "the Board . . . analyzes each case [where no renunciatory oath is present] to ascertain whether the expatriatory act 'would render it impossible for [the citizen] to perform the obligations of U.S. citizenship.'"¹¹⁹ I make no claim that it is going to be easy to decide what conduct presents such a conflict of allegiances.¹²⁰ But the test does three things properly: it captures a set of cases beyond the set of the intent-to-relinquish test that, under my analysis, ought to be permissible grounds for denationalization; it puts the burden on the government to establish the conflict; and it makes irrelevant the state-of-mind evidence used by the State Department in the *Kahane* case.

How does all this play out in the case of Meir Kahane? The mere assumption of a seat in a foreign government ought not to be one of the *per se* categories of transferred or lapsed allegiance. Indeed, the Board of Appellate Review has already so concluded in the case of another Knesset member.¹²¹ Thus Kahane's case should be judged under the "conflict" test for divided allegiance. That is, the case ought to be decided by comparing the duties of a Knesset member with the obligations of U.S. citizenship.

Oddly enough, the Board of Appellate Review spoke to this issue in purporting to decide whether or not Kahane intended to relinquish U.S. citizenship. Its reasoning seemed to be that if a citizen assumes a position that necessarily entails a conflict of loyalties then she must be deemed to have intended to give up her prior loyalty: "Conceptually

119. Note, *United States Loss of Citizenship Law After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. INT'L. L. & POL. 829, 878 (1984) (quoting *In re PAB*, Bd. App. Rev. 6 (Sept. 29, 1982)). Why the Board thinks this is an appropriate test for *intent* is unclear.

120. It seems reasonably clear that dual nationality alone does not normally present any irreconcilable conflicts in allegiance.

121. *In re M.F.* (Dept. of State, Board of Appellate Review, Jan. 29, 1982), discussed in *Kahane* at 12. The Board of Appellate Review characterized this case in its *Kahane* decision as follows:

In re M.F. turned on what the majority (one member dissented) called "very thin edges of highly unusual circumstances" mainly because of the following considerations: M.F. had gained her seat in the Knesset only because the Civil Rights party had won an unexpected number of seats, she being third on the list of candidates; M.F. appeared rarely in the Knesset and when she did, was mainly active on women's rights issues; she did not involve herself in the broader political issues in Israel. Although the Board found that M.F.'s service in the Knesset was "highly persuasive of a manifest intent to relinquish her United States citizenship and that very unusual circumstances would be required to overcome the presumption of intent to abandon her allegiance to the United States," the majority opinion emphasized M.F.'s lack of any "significant participation in the political community prior to the election, and saw nothing in her dedication to women's rights issues while serving in the Knesset that signified a conflict with or abandonment of allegiance to the United States. On balance, the majority considered that the record left the issue of appellant's voluntary relinquishment of her United States citizenship 'to some extent in doubt.' The Board accordingly resolved the doubt in favor of continuation of citizenship.

Kahane at 12.

and functionally, . . . serving in the legislature of a foreign state, friendly or not, is on its face inconsistent with an intent to retain United States citizenship. The potential for constant clash of loyalties is as limitless as it is obvious.”¹²² Putting aside the Board’s (unsustainable) conclusion about intent,¹²³ the Board offers no support for its *ipse dixit* regarding the “potential” for a “clash of loyalties.” I do not claim that no such clash is conceivable. I would, however, require the State Department to be quite specific in detailing the obligations of U.S. citizenship that a member of the Israeli Knesset cannot fulfill.¹²⁴ Until the Department meets that burden, under my analysis, Meir Kahane ought to remain a citizen of the United States.

Of course, there is no small irony in this conclusion. It means that the Constitution ought to protect Meir Kahane from precisely the kind of harm that he would inflict upon hundreds of thousands of Arabs now living in Israel.

122. *Kahane* at 12.

123. Surely one can seek elective office in a foreign country and still intend to maintain the benefits of U.S. citizenship.

124. For example, membership in the legislature of a nation at war with the United States would raise “obvious” conflicts of loyalty. But little short of this is “obvious.” Indeed, the Board’s decision not to denationalize another Knesset member, *see* note 121 *supra*, makes its categorical assertion here incoherent.